# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

Fresh & Easy Neighborhood Market Inc.,	)	
	)	
and	)	Case Nos. 31-CA-29913, et al.
	)	358 NLRB No. 65
United Food and Commercial Workers	)	
International Union.	)	

# RESPONDENT'S OPPOSITION TO MOTION FOR RECONSIDERATION

Respondent Fresh & Easy Neighborhood Market Inc. opposes Charging Party's Motion for Reconsideration. The Motion asks the Board to reverse its decision on the appropriate remedy and to issue a broad remedial order. Charging Party's Motion should be denied for two distinct reasons. First, the Motion is procedurally deficient. Second, it lacks merit. Charging Party has not met the extraordinarily high burden of establishing a broad order is warranted.

## I. Charging Party's Motion Is Procedurally Deficient.

At the outset, Charging Party's Motion does not comport with the Board's Rules & Regulations. "A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration . . . after the Board decision or order. A motion for reconsideration . . . shall specify the page of the record relied on." 29 C.F.R. § 102.48(d). Charging Party argues -- without citing any record evidence -- that Respondent should be subject to a broad order because of alleged corporate involvement in violations found in other cases and because Respondent is a recidivist. Charging Party made essentially the same arguments in its brief before the Board in opposition to Respondent's exceptions in this case, and the Board already has found a "broad order is not warranted under the circumstances of this case." 358 NLRB No. 65, slip op. at 3 (June 25, 2012). Charging Party provides no new, extraordinary reason to overturn the Board's holding in its Motion. Moreover, the newly alleged "facts" are not in the record in this case, and most are not in the record in any NLRB case because they are

not true (see Section II, *infra*). Accordingly, Charging Party's Motion does not satisfy the requirements of the Board's own Rules and Regulations and should be denied for this reason alone.

#### **II.** Charging Party's Motion Lacks Merit.

The alleged facts cited by Charging Party in the Motion are insufficient to warrant a reversal of the Board's decision and the issuance of a broad order. In *Hickmott Foods*, the Board made clear that a broad order should issue "only when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct [so] as to demonstrate a general disregard for the employees' fundamental statutory rights." 242 NLRB 1357, 1357 (1979).

Charging Party has come nowhere near meeting this extraordinarily high burden. It alleges only that Respondent (1) had corporate involvement in two non-hallmark violations of the Act involving a supervisor's oral promulgation of an overly broad "no-talking" rule to one employee at one store and Respondent's written promulgation of an overly broad no-distribution rule in its handbook (which it immediately corrected), (2) required the Board to seek enforcement of its orders in two cases, (3) failed to remedy the unfair labor practices of 2 Sisters Food Group ("2sfg") -- an entity entirely separate from Respondent, and (4) required the Board to enforce a subpoena improperly served by Charging Party on Respondent. However, these alleged facts cited in the Motion, even if true, do not allow for a broad order.

First, they do not show a proclivity to violate the Act, as the Board has already held in its decision in this case. The Board found that Respondent's promulgation of two overly broad rules in 356 NLRB Nos. 85 and 90 and the underlying violations in this case were not enough to issue a broad order, yet Charging Party cites no new violations of the Act in its Motion. Thus,

there can be no finding that a broad order is warranted because there is no new fact establishing a proclivity to violate the Act.

Second, the alleged facts do not show that Respondent has engaged in misconduct that would warrant a broad order. The enforcement of 356 NLRB Case Nos. 85 and 90 and the subpoena enforcement in Case No. 21-CA-039469 do not constitute misconduct and are wholly irrelevant to the analysis of whether a broad order should issue. Indeed, if these enforcement actions are factored into a decision to issue a broad order, then there would be a serious interference with due process, the Act, and possibly even the First Amendment given Respondent's clear and established right to judicial review. Tellingly, Charging Party cites no authority for its proposition that a charged party's decision to seek review or to require enforcement warrants a broad order in another case. That is because there is no such authority.

The Board notably already rejected Charging Party's arguments in this regard with respect to the petitions for review in 356 NLRB Nos. 85 and 90, ruling that a narrow order is appropriate, even in the face of Charging Party's petitions. *See* 358 NLRB. No. 65, slip op. at 3. Court enforcement of these orders in both cases issued well before the Board ruled in this case, and therefore these enforcement actions are not "new" facts, as required for Charging Party to prevail on this motion. *See* 29 C.F.R. § 102.48(d). The Board should further note that Respondent immediately began to comply with the orders upon enforcement.

Additionally, in Case No. 21-CA-039649 there has been no finding of misconduct, and the record is not even closed. Respondent has cooperated with Region 21 to resolve the case, and the Region has submitted the settlement to ALJ McCarrick for his approval. As part of the settlement, as proposed by Respondent, it would conduct management and supervisory Section 7 training at all of its retail stores nationwide to further educate its personnel regarding the Act's

requirements. Such a settlement would go far beyond the actual scope of the case itself, which involved a no-solicitation sign posted at five stores, and a corresponding rule entirely unrelated to the issues in this case. Respondent is trying to be a responsible employer in relation to the Act.

With respect to the 2sfg case, Respondent could not have committed any violations of the Act in a case to which it was not even a party. Charging Party also has presented absolutely no evidence that Respondent would be liable for any allegations related to 2sfg or that those allegations have any bearing on this case. Charging Party's allegation does not show that Respondent has engaged in misconduct -- let alone egregious or widespread misconduct -- in relation to its claims involving the 2sfg case.

Finally, Charging Party cites no case authority or record support for its claim that alleged corporate involvement establishes egregious or widespread misconduct sufficient to meet the *Hickmott Foods* test. In any event, the record in 356 NLRB No. 90 establishes that Respondent's corporate employee relations department attempted to correct an overbroad solicitation rule orally promulgated to a single employee by the store manager; and, as even Charging Party does not dispute, had no involvement in the invitation to quit made by a team leader to an employee. (These were the only allegations at issue in 356 NLRB No. 90.) Charging Party further claims Employee Relations Director Nahal Yousefian had "extensive involvement" in 356 NLRB No. 85, but it does not cite even one example of her purported involvement in violations found in that case. Actual facts developed on the record are not a trifle with which Charging Party can casually dispense. There simply was not the corporate involvement Charging Party claims there was in those cases.

Moreover, any such corporate involvement in those cases has nothing to do with the violations found in this case. In this case, the facts and circumstances were limited to a single store and its personnel. There was no corporate involvement with respect to the store manager Pablo Artica's statements or his decision to require employees to distribute the coupon at issue in this case. Regardless, corporate involvement in the underlying violations in this case and in other cases is not sufficient to establish a broad order is warranted under the *Hickmott Foods* test.

#### **CONCLUSION**

To reiterate Respondent's arguments raised in its briefing on exceptions, a broad order is not warranted because the underlying allegations in 356 NLRB Nos. 85 and 90 involved entirely different violations of the Act and/or entirely different stores: a finding of an overly broad distribution policy that was in effect back in early 2009 (which has been revised and clarified to all employees and which was not found to have chilled any distribution or other Section 7 activity), a finding of unlawful interrogation and surveillance at a single Las Vegas store, a finding of an unlawful oral promulgation of a "no talking about the union or discipline" rule at one San Diego store, and a finding of an unlawful invitation to quit at the same San Diego store. Fundamentally, Respondent is not being contumacious. None of these violations are "hallmark" violations. Many of them are limited to discrete stores -- Respondent has approximately 170 stores in several states. Additionally, all of them were relatively close in time, and there has been no effort in the face of Board findings regarding unclear areas of appropriate conduct to then contumaciously violate the Act.

In the end, the Motion seeking a broad order in this case is misplaced, as the Board already decided. *See* 358 NLRB No. 65, slip op. at 3. Charging Party has not shown any new, extraordinary circumstances that warrant reconsideration and that support a broad order. Charging Party's Motion for Reconsideration should be denied.

Dated: August 13, 2012 Respectfully submitted,

Fresh & Easy Neighborhood Market, Inc.

By /s/ Molly Eastman\_\_\_

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### **CERTIFICATE OF SERVICE**

I certify that I have caused a true and correct copy of the foregoing RESPONDENT'S OPPOSITION TO MOTION FOR RECONSIDERATION to be served upon the following via the NLRB's e-filing system on August 13, 2012:

Lester A. Heltzer
Executive Secretary
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I further certify that I have caused a true and correct copy of the above-referenced document to be served on the following by email on August 13, 2012:

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> /s/ Molly Eastman\_ Molly Eastman